Dear Ms Collins

SUBMISSION: SECOND ROUND OF COMMENTS ON THE DRAFT NOTICE IN TERMS OF SECTION 29 OF THE TAX ADMINISTRATION ACT, 2011

1. Thank you for affording the South African Institute of Chartered Accountants the opportunity to provide our feedback and inputs on the above matter.

2. Please find below the SAICA Transfer Pricing sub-committee’s (a sub-committee of SAICA’s National Tax Committee) response to the request for the second round of comments on the draft notice setting out additional record-keeping requirements for transfer pricing transactions.

Interaction between draft notice and Practice Note 7

3. Though not a matter directly attributable to the draft notice, practically clarification is necessary as to the interaction between the section 29 regulations and current practice note 7.

4. Submission: Clarity is required about the interaction between this notice and practice note 7.

Paragraph 2 – Ambit of compliance obligation: Potentially affected transactions

5. The draft public notice will currently apply to years of assessment commencing on or after 1 July 2016.

6. Paragraph 2 of the notice further requires documents to be retained by a person who has entered into a potentially affected transaction. However, no date is provided regarding when the affected transaction should have been entered into.
7. The result is that if an amount is received by, or accrues to, a person after 1 July 2016 in respect of a potentially affected transaction entered into prior to the effective date; it is not clear whether that person is within the ambit of the record keeping requirements of the public notice.

8. **Submission:** It is submitted that the draft notice provide clarity on its applicability to amounts received, accrued or incurred after the effective date but in respect of affected transactions entered into prior to the effective date.

**Effective date of the public notice**

9. **Submission:** Given the nature and extent of the documentation required in terms of the draft notice, it is submitted that the effective date apply to years of assessment commencing on or after the publication date of the final version of the public notice. This will allow taxpayers to have sufficient time to comply with the new requirements.

**Paragraph 3(a) – ownership structure**

10. Paragraph 3(a) of the draft notice requires that the following records be kept:

    “A description of the person’s ownership structure, with details of shares or ownership interest in excess of 10 per cent held by the person or therein by other persons as well as a description of all foreign connected persons with which that person is transacting and the details of the nature of the connection;”

11. While the requirement is a “description” of the ownership structure, this information is usually easier to present in the form of an organogram.

12. **Submission:** It is therefore submitted that the notice be amended to read:

    “An organogram of the person’s ownership structure, with details of shares or ownership interest…”

13. It is also unclear what is meant by a “description of all foreign connected persons” as well as “details of the nature of the connection”.

14. **Submission:** It is submitted that clarity be provided in this regard.

**Paragraph 3(c)(ii) – meaning of ‘senior management’**

15. This paragraph in the draft notice requires “an organogram showing the title and location of the senior management team members”.

16. However, the term ‘senior management’ is not defined, which could result in taxpayers having different ideas as to the meaning of senior management.
17. **Submission:** To alleviate doubt as to the meaning of the term, it is submitted that the public notice use the same definition of senior management that appears in SARS’ Interpretation Note 6.

**Paragraph 4(e)(i) - all staff involved in the affected transaction**

18. Paragraph 4(e)(i) refers to “an organogram showing the title and location of all staff involved in the affected transaction”.

19. **Submission:** It is submitted that the relevant portion be amended to read “all staff *directly* involved in the affected transaction”. The current reference to all staff involved in the affected transaction is very broad and may “capture” unintended staff members.

20. Our proposed amendment will narrow the information required those staff members having a direct impact on the relevant affected transaction.

**Paragraph 4(p) - Records, books of account or documents to be kept in respect of transactions**

21. Paragraph 4(p) requires copies of existing unilateral, bilateral and multilateral APAs and other tax rulings to which SARS is not a party and which are related to the potentially affected transactions.

22. **Submission:** The concern for taxpayers is that the disclosure of such APAs and rulings to SARS would result in a breach of the confidentiality clauses forming part of these agreements and rulings with the relevant foreign tax authorities.

**Commissioner’s discretion**

23. As previously submitted, the listed documents are a very comprehensive list that does not seem to accommodate documents available and compiled in various different industries or factual situations.

24. The reality remains that this comprehensive list cannot be imposed as a one size fits all as in reality it will not do so.

25. **Submission:** To facilitate that SARS’ needs for information are balanced with various taxpayers’ ability to provide such information, in principle the regulations should provide a discretion to the Commissioner to enable him to vary the requirements as may be necessary to balance the opposing obligation and need.
Yours sincerely

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